Supreme Court, U.S.
FILED
00 78 JUN 8 2000
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

JACK LARA,

Petitioner,

v.

STATE OF NEBRASKA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court For The State Of Nebraska

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Jack Lara was convicted of Assault First Degree and Use of Deadly Weapon in Commission of Felony in the Hall County District Court of Nebraska. The District Court denied Lara's Motion to Suppress the weapon on grounds that as an overnight house guest, he lacked standing to challenge the warrantless seizure of the weapon.

Lara appealed to the Nebraska Court of Appeals. Upon its own motion, the Nebraska Supreme Court removed the case to its docket. The Nebraska Supreme Court held that the trial court erred in finding that Lara had no standing to challenge the search. However, the Nebraska Supreme Court determined that under the facts of this case, such an error was harmless beyond a reasonable doubt. The questions presented here are:

Did the Nebraska Supreme Court err in applying the harmless error analysis to the issue of standing, which effectively denied Lara his substantive right to challenge evidence seized in violation of his Fourth Amendment right?

Did the Nebraska Supreme Court err in holding that the error was harmless beyond a reasonable doubt when the issue was not raised by the State, and therefore the Court did not make the State bear the burden of proving that the error passed constitutional muster?

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PETITION FOR WRIT OF CERTIORARI

Jack Lara respectfully prays that a writ of certiorari to review the judgment and opinion of the Nebraska Supreme Court entered March 10, 2000, in order to decide an important question of federal law that has not been, but should be, settled by this Court.

OPINIONS BELOW

The opinion of the Nebraska Supreme Court that gives rise to this petition is reprinted in Appendix A hereto (App. A) *at page* 1.

JURISDICTION

On March 10, 2000, the Nebraska Supreme Court held that the trial court erred in finding that Lara had no standing to challenge the search and seizure of evidence. However, the court determined that such an error was harmless beyond a reasonable doubt. Lara was effectively denied his federal Fourth Amendment right to challenge illegally obtained evidence. The federal question of whether a State court can apply the harmless error analysis to this issue has not been, but should be, addressed by this court pursuant to Rule 10(c). Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days after the entry of the judgment.

STATUTES INVOLVED IN THIS CASE

Neb.Rev.Stat. Section 29-822 (Reissue 1995) states in pertinent part:

Any person aggrieved by an unlawful search and seizure may move for return of the property so seized and to suppress its use as evidence.

Neb.Rev.Stat. Section 25-853 states:

> The court in every stage of an action must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect.

STATEMENT OF THE CASE

Jack Lara was convicted of assault in the first degree and use of a weapon to commit a felony in relation to the August 2, 1998 shooting of Martin Logan. During a party on the night of August 2, 1998, a fight broke out between Logan, Mark Wortman, and several other people, including Lara, at the residence of Mark Wortman. During the fight, Logan was shot three times and sustained serious injuries.

Police officers initially searched the Wortman residence with the permission of Kathleen Wortman, but did not find the weapon involved in the shooting. Officers then questioned Lara, who matched the description of the shooter. Lara agreed to speak to the police. During questioning, Lara indicated that he had shot Logan because

Logan had hit Mark Wortman. Lara told the officers that the gun used in the shooting was located in the northwest basement bedroom of the Wortman residence.

Officers returned to search the Wortman residence without a warrant, but they obtained permission from Kathleen Wortman to search the residence. Officers found a gun inside a zippered day planner in the northwest basement bedroom. Officers spoke to Kathleen Wortman, and she indicated that Lara was a weekend houseguest.

Lara was arrested and charged with attempted first degree murder, two counts of use of a deadly weapon to commit a felony, and assault in the first degree. Lara filed a motion to suppress evidence, including the gun found at the Wortman residence.

On December 14, 1998, a hearing was held on the motion to suppress. At the hearing, Lara testified that he was an overnight guest at the Wortman residence on August 2, 1998. Lara also testified that he was the owner of the zippered day planner in which the gun was found.

The trial court denied Lara's motion to suppress the gun, finding that Lara had no standing to object to the search. The trial court determined that Lara had no reasonable expectation of privacy in that room, and thus no standing to object to the search.

Pursuant to an agreement between Lara and the State, Lara waived his right to a jury trial in return for the States dismissal of the attempted first degree murder charge and use of a weapon charge. The case was tried before the court. Lara objected to evidence which made reference to the gun and other evidence which Lara

claimed was seized in violation of his Fourth Amendment rights. Lara was found guilty of both charges and sentenced to 13 to 16 years imprisonment on the assault conviction and 2 to 4 years imprisonment on the use of a weapon conviction, with the sentences to be served consecutively.

Lara appealed to the Nebraska Court of Appeals in a timely manner. The Nebraska Supreme Court removed the case to their docket. At no time during the course of these proceedings did the State allege that errors made were harmless. During oral arguments, the State was asked if Lara would be prejudiced by the denial of his right to challenge the seizure of evidence. The State acknowledged that he would be prejudiced by the denial.

The Nebraska Supreme Court held that Laras status as an overnight house guest is enough alone to show that he had a legitimate expectation of privacy in the premises which is protected by the Fourth Amendment, and therefore had standing to challenge the search and seizure of evidence. However, the court stated that there was sufficient evidence to convict Lara, and therefore the error made by the trial court was harmless beyond a reasonable doubt.

REASONS FOR GRANTING THE WRIT

I. THE CONSTITUTIONAL RIGHT TO CHALLENGE EVIDENCE SEIZED IN VIOLATION OF THE FOURTH AMENDMENT SHOULD BE SO BASIC TO A FAIR TRIAL THAT THEIR INFRACTION SHOULD NEVER BE TREATED AS HARMLESS ERROR.

The Nebraska Supreme Court effectively denied Lara his Fourth Amendment right to challenge evidence seized illegally. The Nebraska Supreme Court held that the trial court erred, and Lara did have standing to challenge the seizure, but they denied him that right by applying the harmless error analysis to this Fourth Amendment right. To Lara's knowledge, there is no other court that has held that the right to challenge illegally obtained evidence is subject to the harmless error analysis. The United States Supreme Court has the authority to review State application of the harmless error rule when substantive federal rights are involved.

In *Chapman v. California*, 386 U.S. 18, 21 (1966), the Court stated:

> "The application of a state harmless-error rule is, of course, a state question where it involves only errors of state procedure or state law. But the error from which these petitioners suffered was a denial of rights guaranteed against invasion by the Fifth and Fourteenth Amendments, rights rooted in the Bill of Rights. . . . "

Although not all constitutional violations rise to the level of requiring reversal of conviction, the Court in *Chapman* stated that "there are some constitutional rights so basic to a fair trial that their infraction can never be

treated as harmless error." *Id.* at 23. The Court stated further, "[A]n error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot, under *Fahey*, be conceived of as harmless." *Id.* at 23-24.

In the case at bar, Lara did not have the opportunity to challenge the search and seizure of evidence even though the Nebraska Supreme Court held that he had standing to challenge such evidence. He was totally stripped by the Nebraska Supreme Court of his Fourth Amendment right to challenge evidence obtained in violation of the Bill of Rights. This right is so basic to the right to a fair trial that it should never be subject to the harmless error analysis.

II. THE NEBRASKA SUPREME COURT DID NOT MAKE THE STATE BEAR THE BURDEN OF PROVING THAT THE ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

In *Brecht v. Abrahamson*, 507 U.S. 619 (1993), the U.S. Supreme Court states, "After examining existing harmless-error rules, . . . we held that 'before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.' . . . The State bears the burden of proving that an error passes muster under this standard." 507 U.S. at 630.

In *Chapman v. California*, at 24, the U.S. Supreme Court states,

> "Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless. It is for that reason that the original common-law harmless-error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment."

In the case at bar, the State never raised the issue of harmless error. During oral argument, the State was asked if Lara would be prejudiced by the denial to challenge evidence. The State acknowledged that he would. Nevertheless, the Nebraska Supreme Court applied the harmless error rule to this issue.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully Submitted By:

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APPENDIX A

OPINION OF THE SUPREME COURT OF NEBRASKA

Case Title

STATE OF NEBRASKA, APPELLEE,
V.
JACK LARA, APPELLANT.

Case Caption

STATE V. LARA

Filed March 10, 2000. No. S-99-614.

Appeal from the District Court for Hall County; TERESA K. LUTHER, Judge. Affirmed. Edouardo Zendejas for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

HENDRY, C.J.

INTRODUCTION

Jack Lara was convicted of assault in the first degree and use of a weapon to commit a felony in relation to the August 2, 1998, shooting of Martin Bernard Logan. Lara appeals, claiming that the district court erred in denying his motion to suppress certain evidence. We moved this case to our docket pursuant to our power to regulate the Nebraska Court of Appeals' caseload and that of this court. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

BACKGROUND

On August 2, 1998, Logan attended a party at the home of Kathleen Wortman in Grant Island, Nebraska. Estimates of the number in attendance ranged from 20 up to 100 people. Lara, a friend of Kathleen Wortman's son, Mark Wortman, was an overnight guest at the Wortman residence at the time.

During the course of the party, a fight ensued involving Logan, Mark Wortman, and several other people, including Lara. During the fight, Logan was shot three times. The shooter was described as being a Hispanic male, 5 feet 6 inches tall, with buzz-cut, black hair; weighing 150 pounds; and wearing a striped shirt. Logan sustained serious injuries as a result of the shooting.

Police officers initially searched the Wortman residence with the permission of Kathleen Wortman, but did not find the weapon involved in the shooting. Officers then questioned Lara, who matched the description of the shooter. Lara was given his *Miranda* warnings and signed a waiver form indicating that he understood his rights and that he agreed to speak to the police without consulting with or having a lawyer present. During questioning, Lara initially denied any involvement in the shooting, but later indicated that he had shot Logan because Logan had hit Mark Wortman. Lara told the officers that the gun used in the shooting was located in the northwest basement bedroom of the Wortman residence.

Officers then returned to the Wortman residence and spoke with Kathleen Wortman. She stated that Lara was an overnight guest in the home. Officers did not have a search warrant, but obtained permission from Kathleen

Wortman to search the entire residence. Officers found a gun inside a zippered "day planner" in the northwest basement bedroom. Ballistics testing determined that shell caseings found outside the Wortman residence where the shooting occurred had been fired from the gun retrieved from the Wortmans' basement.

Lara was arrested and charged in an amended information with attempted first degree murder (count I), two counts of use of a deadly weapon to commit a felony (counts II and IV), and assault in the first degree (count III). Lara filed a motion to suppress evidence, including the gun found at the Wortman residence.

On December 14, 1998, a hearing was held on the motion to suppress. At the hearing, Lara testified that he was an overnight guest at the Wortman residence on August 2, 1998. Lara stated he stayed in the basement of the Wortman residence. Lara's luggage was kept upstairs in another bedroom when he first arrived, was then moved to the basement room in which he was staying, and was later moved back upstairs. The day planner which contained the gun involved in the shooting was found in another bedroom in the basement, not the room in which Lara was staying. Officer Timothy Meguire also testified at the hearing. He testified that a gun was found in the northwest bedroom in the basement of the Wortman residence inside a zippered day planner. Meguire testified that he had obtained consent from Kathleen Wortman to search the entire residence.

The court denied Lara's motion to suppress the gun, finding that Lara had no standing to object to the search. The court noted that the gun was found in a room other

than the one in which Lara was staying and that none of Lara's other belongings were located in that room. The court determined that under these facts, Lara had no reasonable expectation of privacy and, thus, no standing to object to the search. The court also overruled Lara's motion to suppress statements made while in custody, finding that the statements were voluntarily made by Lara after being properly given his *Miranda* warnings.

Pursuant to an agreement between Lara and the State, Lara waived his right to a jury trial in return for the State's dismissal of the attempted first degree murder charge and use of a weapon associated with that charge. The case was submitted to the court on a variety of police reports regarding the shooting, including a photographic lineup "fact sheet," in which Logan identified Lara as the person who shot him. The police reports were admitted into evidence over Lara's objections to certain portions of the reports which contained statements Lara made while in custody and references to the gun which Lara claimed was seized in violation of his Fourth Amendment rights.

Lara was found guilty of first degree assault and use of a weapon to commit a felony. Lara was sentenced to 13 to 16 years' imprisonment on the assault conviction and 2 to 4 years' imprisonment on the use of a weapon conviction, with the sentences to be served consecutively.

ASSIGNMENTS OF ERROR

Lara claims, rephrased and summarized, that the district court erred in (1) denying his motion to suppress by finding that Lara had no standing to object to the seizure of the gun found at the Wortman residence, where he was

an overnight guest, and (2) finding him guilty based on evidence that should have been suppressed.

STANDARD OF REVIEW

In reviewing a district court's ruling on a motion to suppress evidence obtained through a warrantless search or seizure, an appellate court conducts a de novo review of reasonable suspicion and probable cause determinations, and reviews factual findings for clear error, giving due weight to the inferences drawn from those facts by the trial judge. *State v. Bartholomew, ante* p. 174, 602 N.W.2d 510 (1999). A trial court's findings in a criminal case have the effect of a jury verdict, and a conviction in a bench trial will be sustained if the properly admitted trial evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Meers*, 257 Neb. 398, 598 N.W.2d 435 (1999).

ANALYSIS

Lara claims the trial court erred in denying his motion to suppress, finding that he had no standing to object to the search of the Wortman home. The trial court determined that Lara had no reasonable expectation of privacy in the area from which the gun was seized because the gun was seized from a room other than the one in which Lara was staying.

To determine whether an individual has an interest protected by the Fourth Amendment and Neb. Const. art. I, § 7, one must determine whether an individual has a legitimate or justifiable expectation of privacy in the

invaded place. Ordinarily, two inquiries are required. First, the individual must have exhibited an actual (subjective) expectation of privacy, and second, the expectation must be one that society is prepared to recognize as reasonable. *State v. Ortiz*, 257 Neb. 784, 600 N.W.2d 805 (1999).

The U.S. Supreme Court has held that an individual's status as an overnight guest is enough alone to show that he or she has a legitimate expectation of privacy in the premises which is protected by the Fourth Amendment. *Minnesota v. Olson*, 495 U.S. 91, 110 S. Ct. 1684, 109 L. Ed. 2d 85 (1990). Likewise, this court has recognized that an overnight guest has an expectation of privacy in his or her host's home, which society is willing to recognize as reasonable, and, therefore, the overnight guest has standing to assert Fourth Amendment violations. *State v. Conklin*, 249 Neb. 727, 545 N.W.2d 101 (1996); *State v. Cody*, 248 Neb. 683, 539 N.W.2d 18 (1995); *State v. Cortis*, 237 Neb. 97, 465 N.W.2d 132 (1991); *State v. Walker*, 236 Neb. 155, 459 N.W.2d 527 (1990).

In the present case, Lara was an overnight guest in the Wortman home at the time of the search. Lara's status as an overnight guest is enough alone to show that he had a legitimate expectation of privacy "in the premises" which is protected by the Fourth Amendment. *Walker*, 236 Neb. at 160, 459 N.W.2d at 531. The district court found that Lara had no standing because the gun was found in a room other than the one in which he was sleeping. This fact, however, is insufficient to deny Lara standing to challenge the search. An overnight guest has a legitimate expectation of privacy in his or her host's "home" or in the "premises." See, *Olson, supra; Conklin, supra; Cody,*

supra; Cortis, supra; Walter, supra. Cases discussing an overnight guest's legitimate expectation of privacy do not limit this expectation of privacy to only the room in which the guest actually stayed. *Id.* The record in the present case indicates that Lara slept in a basement bedroom next to the room in which the gun was found but that his belongings had been moved around to various places in the house. While an overnight guest's legitimate expectation of privacy does not extend to areas of the host's home which are off limits to the guest or of which the guest has no knowledge, *U.S. v. Osorio*, 949 F.2d 38 (2d Cir. 1991), there is no evidence that Lara was confined to a restricted area of the residence or that any area of the home was off limits.

Lara's status as an overnight guest in the Wortman home gives him standing to contest the search. The district court erred in finding that Lara had no standing. However, this does not end our inquiry. Not all trial errors, even trial errors of constitutional magnitude, entitle a criminal defendant to the reversal of an adverse trial result. *State v. Merrill*, 252 Neb. 736, 566 N.W.2d 742 (1997).

In a bench trial of a law action, including a criminal case tried without a jury, erroneous admission of evidence is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's factual findings necessary for the judgment or decision reviewed; therefore, an appellant must show that the trial court actually made a factual determination, or otherwise resolved a factual issue or question, through the use of erroneously admitted evidence in a case tried without a jury. *State v. Lujano*,

251 Neb. 256, 557 N.W.2d 217 (1996). See, also, *State v. Lomack*, 239 Neb. 368, 476 N.W.2d 237 (1991) (explaining that burden rests on appellant because of "presumption" that trial court, sitting as fact finder, disregards inadmissible evidence). The appellant must show that the trial court made a finding of guilt based exclusively on the erroneously admitted evidence. *State v. Emrich*, 251 Neb. 540, 557 N.W.2d 674 (1997); *Lujano, supra; Lomack, supra*. If there is other sufficient evidence to support the finding of guilt, the conviction will not be reversed. *Lujano, supra*.

We conclude that even without the gun or any related ballistics testing, there was overwhelming evidence to convict Lara. Lara was present at the party when the shooting occurred. He matched the description of the shooter. Logan identified Lara in a photographic lineup as the person who shot him. Lara admitted that he committed the shooting. Although Lara objected to the portions of the police reports containing this admission, he has not assigned or argued any error in relation to the admission of this evidence. The properly admitted evidence overwhelmingly supports Lara's conviction, even if the gun evidence would have been suppressed. Lara has not shown that the trial court based its finding of guilt exclusively on the erroneously admitted evidence.

Lara claims he was prejudiced by the incorrect ruling on the motion to suppress because he waived his right to a jury trial after the court overruled his motion to suppress. He claims he waived his right to a jury in order to avoid having the gun displayed to the jury at trial. However, the record indicates that this was not the reason Lara waived his right to a jury. The record establishes that Lara waived his right to a jury trial as part of an

agreement whereby the State dismissed counts I and II, and in exchange, trial would be to the court on counts III and IV, based upon police reports. The agreement further required the State, upon conviction, to stand silent at the time of sentencing and to make no objection to a request by Lara for an appeal bond of 10 percent of $50,000. On this record, Lara has not shown that he was prejudiced by the trial court's error regarding the motion to suppress.

In his second assignment of error, Lara claims that without the gun, there was insufficient evidence to convict him. However, as we have previously stated, there was overwhelming evidence to convict Lara, even without the gun. This assignment of error is without merit.

CONCLUSION

The trial court erred in finding that Lara had no standing to challenge the search of the Wortman residence. However, we determine that on the facts of this case, such error was harmless beyond a reasonable doubt. The conviction is affirmed.

AFFIRMED.